Before the
FEDERAL COMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
Implementation of Section 621(a)(1) of)
the Cable Communications Policy Act of 1984) MB Docket No. 05-311
as amended by the Cable Television Consumer)
Protection and Competition Act of 1992)

COMMENTS OF NORTHERN DAKOTA COUNTY CABLE COMMUNICATIONS COMMISSION ("NDC4")

These Comments are filed by Northern Dakota County Cable Communications Commission ("NDC4") in support of the comments filed by the National Association of Telecommunications Officers and Advisors ("NATOA") and in support of the comments filed jointly by the League of Minnesota Cities ("LMC") and Minnesota Association of Community Telecommunications Administrators ("MACTA"). Like the above-mentioned organizations, of which NDC4 and its member cities are members, NDC4 believes that local governments can issue appropriate local franchises for new entrants into the video services field on a timely basis, just as we have for established cable services providers. In support of this belief, we wish to inform the Commission about the facts of video franchising in our community.

Cable Franchising in Our Community

Community Information

NDC4 is a municipal joint powers cooperative with seven member cities including Inver Grove Heights, Lilydale, Mendota, Mendota Heights, South St. Paul, Sunfish Lake, and West St. Paul ("Member Cities") with a population of approximately 85,000. Our franchised cable provider is Comcast. NDC4 has negotiated, administered and enforced its Member Cities' cable franchises since 1985. The original franchisee was Continental Cablevision, which was later transferred to MediaOne, then AT&T Broadband, and now Comcast.

Our Current Franchise

Our current franchise began in April 2000 and expires in March 2015. Under the statutory timeline laid out in the Federal Cable Act, the cable operator has a 6-month window beginning 36 months before the expiration of the franchise in which to request a renewal under the Federal Act. As a result, at this time we are not yet currently negotiating a franchise renewal with the incumbent provider. The original franchise was granted in April 1985 and later renewed in April 2000.

Our franchise requires the cable operator to pay a franchise fee to NDC4 in the amount of 5% of the cable operator's revenues. The revenues for franchise fee purposes are calculated based on the gross revenues of the operator, in accordance with the Federal Cable Act.

We require the cable operator to provide the following capacity for public, educational, and/or governmental ("PEG") access channels on the cable system: we currently have seven (7) channels devoted public access (2), educational access (1), government access (2), community television (1), and a 24-hour community bulletin board (1).

Our franchise requires that the cable operator support our PEG channels in the following ways: Comcast remits a quarterly payment and several scheduled capital equipment grants spread out over the 15-year term of the franchise. Comcast recoups the funds by collecting from its subscribers a monthly "PEG Fee" on the subscribers' bills. Comcast provides fiber optic links to four city hall facilities and to our PEG studio for live broadcasting. Comcast also provides technical assistance and support related to the signal distribution from our facilities to Comcast's hubs and head-end and then to the subscribers. Comcast provides line tests when we produce live remote programs outside of our normal studio locations or if we feed our live programs to other neighboring communities outside our franchise area. Comcast is required to provide some in-kind promotional support, such as bill and subscriber packet inserts, cross-channel promotions, and listings on its "TV Guide" channel.

Our franchise contains the following institutional network requirements: Comcast technically supports a separate fiber optic network for institutional use ("I-Net") for some of our schools, cities, libraries, and other government facilities. These I-Net participants chose to reimburse Comcast for the construction cost of the fiber network plus a rate of return, in exchange for use of the fiber network over the remainder of the 15-year franchise. Under this "dark fiber" type of I-Net agreement, the users must pay for their own electronics and hardware, provide their own management of the traffic on the network, and must pay Comcast for any repairs that may be necessary at times. Comcast must build and maintain the network and meet certain minimum technical standards.

We use our I-Net facilities in the following ways: The I-Net is used by three public school districts with multiple buildings, several private schools, four cities with multiple buildings, three public libraries, one community college, and one county service center that also houses a court facility and a state job service agency. Most of these entities use the dedicated dark fiber network (built by Comcast for their use, with the construction cost plus rate of return reimbursed by the institutional users) for their main connection to the Internet, for their main connection to their administrative data provider (such as the State of Minnesota, or the Minnesota Department of Public Safety, or the state technology provider for public education), for interconnection (in some cases) with other government facilities outside our jurisdiction but also served by Comcast, and (for those with multiple sites) for their local area connections between facilities for data, video and/or voice. Our I-Net users were able to greatly increase bandwidth, improve redundancy and reliability, expand applications, and achieve large cost savings and efficiencies through our I-Net. All of these benefits, of course, benefit the residents and taxpayers in our communities.

Our franchise contains the following customer service obligations, by which we are able to help ensure that the cable operator is treating our residents in accordance with federal standards and the terms it agreed to in its franchise: Rates are regulated to the extent permitted by applicable laws and FCC regulations. Customers are protected against deceptive sales practices, and Comcast is required to inform prospective subscribers of all levels of service, including the lowest priced service tiers. Comcast must maintain a convenient local customer service and bill payment location in Dakota County. Comcast must comply with consumer protection standards including office hours and telephone availability, minimum telephone answer time and maximum busy signal as required in FCC customer service standards, and fair business practices in regards to bill payment, payment posting, and late fee policies. Comcast must meet FCC standards with regard to installations, outages, and service calls. Comcast must properly notify customers regarding products, services, pricing, installation, maintenance, technical instructions, channel positions, billing and complaint procedures, and rates. Bills must be clear, concise, and understandable, and Comcast must respond promptly to billing disputes. Refunds and credits must be issued promptly. We require and review customer service compliance reports, subscriber contracts, privacy, refund, and late fee policies.

Our original franchise, which ran from 1985 to 2000, contained a reasonable build schedule for the cable operator, and required the operator to serve all seven Member Cities. Our current franchise requires that any newly annexed or developed areas be constructed within 12 months if they meet prescribed density levels. Where the density does not meet required levels, Comcast must provide parties requesting service with a free written cost estimate for extending the service, and must build out the system after 75% of the persons requesting extension have prepaid their pro rata share of the cost of extension. Any residence located within 125 feet of existing cable plant is entitled to be connected at the standard installation rate. For residents beyond 125 feet the subscriber must pay any additional cost beyond the standard installation for extending the system. Comcast must provide a written estimate within 12 days for any non-standard installation, and must provide a credit if installation is not completed within a specified time.

Our franchise contains a "level playing field" provision based upon similar language in Minnesota Statutes Chapter 238, stating the following:

> "This Franchise shall be nonexclusive, and City reserves the right to grant a use of said Rights-of-Way to any Person at any time during the period of this Franchise for the provision of Cable Service. The terms and conditions of any such grant of use of the Rights-of-Way shall be, when taken as a whole, no less burdensome or more beneficial than those imposed upon Grantee pursuant to this Franchise."

Our franchise contains the following insurance and bonding requirements: $100,000 Performance Bond, $50,000 Security Fund, $2 Million in public liability insurance, indemnification to the Member Cities and NDC4, and proof of insurance for any reconstruction work that may be performed at various times throughout the Franchise term.

The cable franchise grants the cable operator access to the public rights of way and compatible easements for the purpose of providing cable television service. Apart from the franchise, the cable provider is required to obtain a permit from the appropriate municipal office as well before it may access the public rights of way.

The franchise agreement provides for the following enforcement mechanisms by which we are able to ensure that the cable operator is abiding by its agreement: We hold a performance bond and a security fund for the purposes of enforcing provisions of the franchise. The performance bond would be used for recovery of any costs or damages to the City caused by the performance or failure to perform by the cable operator. The security fund would be used to recover costs or damages resulting from acts or omissions by the cable operator, or to collect penalties for various non-compliance items, such as failure to timely complete upgrades or construction, failure to provide data, documents, reports, or information, failure to meet construction, operation or safety standards, failure to provide requirements like PEG channels or equipment, breach of written contract, or failure to comply with provisions of the franchise or applicable law. The franchise provides the operator with opportunities for notice, dispute, and/or correction of noncompliance issues before fines can be collected from the Security Fund.

The Franchising Process

The cable system serving the seven Member Cities also serves many adjoining communities in the Minneapolis/St. Paul area. In 1985 NDC4 negotiated a franchise on behalf of all seven of our Member Cities and recommended that model document, which was ultimately granted identically by each of the seven Member Cities to Continental Cablevision. In the year 2000 we followed the same process in granting a renewal franchise to then-operator MediaOne. Our formation of a seven-city joint powers cooperative allowed the original company applying for the franchise, and 15 years later the company applying for renewal, to quickly and efficiently obtain uniform franchises in these communities so as to be able to serve a large region, while also allowing for individual provisions in specific franchises in order to tailor them to meet local needs.

Under the law, a cable franchise functions as a contract between the local government (operating as the local franchising authority) and the cable operator. Like other contracts, its terms are negotiated. Under the Federal Cable Act it is the statutory obligation of the local government to determine the community's cable-related needs and interests and to ensure that these are addressed in the franchising process – to the extent that is economically feasible. However derived (whether requested by the local government or offered by the cable operator), once the franchise is approved by both parties the provisions in the franchise agreement function as contractual obligations upon both parties.

Competitive Cable Systems

NDC4 and its seven Member Cities processed two applications for competitive franchises between in 2000 and 2001. Unfortunately, one of the companies dropped out of the process prior to the granting of its franchise, and the other company did not execute the franchises after each of the seven Member Cities had approved an identical franchise ordinance for them. Our cable commission structure served to expedite the process for the companies as one central staff reviewed the applications, issued reports and model resolutions recommending approval, published required notices and held required public hearings, allowed the incumbent operator to be informed and participate as appropriate and required under open meeting law and data practices law, and negotiated details of the franchise ordinance that would ultimately be recommended for approval by each of the seven Member Cities. Following are the details of this process.

July 7, 2000, NDC4 received separate applications for a cable television franchise from two separate companies: Everest Connections Corporation ("Everest") and WideOpenWest Minnesota, LLC ("WOW").

August 23, 2000, NDC4's legal counsel Brian Grogan of Moss & Barnett, Minneapolis, Minnesota, presented two separate reports and recommended resolutions for NDC4 and for its individual Member Cities stating, 1) that each of Everest's and WOW's July applications complied with Minnesota Statutes Chapter 238, 2) that Everest and WOW each possessed the requisite legal, technical, and financial qualifications to construct, own, and operate cable communications systems within NDC4's Member Cities, 3) that NDC4's Member Cities should condition any franchise award on the provision of a performance bond, 4) that NDC4's Member Cities should adopt resolutions with respect to Everest's and WOW's qualifications, and 5) that NDC4 finds that its actions are appropriate and reasonable in light of state and federal law.

These reports basically concluded that NDC4 and its Member Cities should move forward to grant franchises to either or both companies, and that all legal procedures to date, including required publications of notice, public hearings, etc., had been appropriately followed. Also, the incumbent operator, at that time MediaOne, had been properly notified of hearings and meetings and was copied on relevant reports and information.

September 6, 2000, NDC4 passed two separate resolutions recommending that its seven Member Cities move forward in granting a franchise to WOW and to Everest. A committee of NDC4 was tasked with working out the franchises with the two companies in order to recommend identical Franchise Ordinances for each of the seven Member Cities to consider.

The existing incumbent franchise was used as the basis for the competing franchises, but some specifics had to be worked out for the competing operators, especially in two major areas: 1) The incumbent's franchise had no reference to initial construction because it had been a renewal franchise, and the system construction and upgrade had already been completed prior to the renewal. The new competing franchise required the new operator to serve all locations where the incumbent operator had constructed (our entire seven-city area) and gave the new competitor three years to complete construction. 2) The new competing operators could not simply duplicate the original Institutional Network ("I-Net") requirements from the incumbent's franchise. NDC4 and its Member Cities did not want or need two or three duplicate dark fiber networks. Similar and equivalent, but not identical, provisions had to be negotiated with the new providers to make sure that a fair and level playing field existed between all competitors, to comply with the existing incumbent NDC4 franchise and with Minnesota Statutes Chapter 238.

NDC4 worked quite efficiently between September and December 2000 to negotiate acceptable terms with the two companies and to pass a recommended model Cable Television Franchise Ordinance for the seven Member Cities' considerations.

The seven Member Cities of NDC4 each adopted a Cable Television Franchise Ordinance with Everest Minnesota, LLC ("Everest") after the appropriate publications and in some cases multiple readings before their City Councils in December 2000 and January 2001. The Ordinances were officially signed on the following dates:

Inver Grove Heights—January 8, 2001
Lilydale—December 18, 2000
Mendota—December 12, 2000
Mendota Heights—December 5, 2000
South St. Paul—December 18, 2000
Sunfish Lake—December 5, 2000
West St. Paul—January 7, 2001

March 9, 2001, Everest notified NDC4 by letter that there would be a "delay" in its business plan. The letter stated, "… As we discussed, the unexpected tightening in the capital markets for both debt and equity has forced us to move forward at a more measured pace. …" The letter stated that the company still hoped to eventually build its system in the Minneapolis/St. Paul Metropolitan Area, after its business plan was proven in its first system in the Kansas City, Missouri, Metropolitan Area. The letter concluded, "… We believe that Cities and Commissions have been both thorough and fair during the franchising process, demonstrating the ability to conduct this process with due diligence while maintaining the expediency necessary in a competitive market."

March 23, 2001, WOW notified NDC4's legal counsel by letter that it was withdrawing its applications pending before NDC4 cities "… with great reluctance." The letter stated, "The positive reception received by our company from Inver Grove Heights underscores the desirability of these markets for WideOpenWest. As you are aware, the present weakness in the capital markets has deferred the build out of competing broadband communications systems in many parts of the country. This circumstance, however, will inevitably change and with that we fully anticipate returning to you and the communities you represent requesting an opportunity to provide these services. …"

While neither Everest nor WOW have returned to Minnesota as of February 2006, we believe that we would be able to process an application for a competitive franchise even faster now that our model competing franchise has been developed. A company with strong legal, technical, and financial qualifications that is willing to meet our local community needs and interests and compete fairly with our incumbent operator will be processed as quickly and efficiently as possible while meeting all local, state, and federal legal obligations.

Conclusions

The local cable franchising process functions well in Northern Dakota County. As the above information indicates, we are experienced at working with cable providers to both see that the needs of the local community are met and to ensure that the practical business needs of cable providers are taken into account.

Local cable franchising ensures that local cable operators are allowed access to the rights of way in a fair and evenhanded manner, that other users of the rights of way are not unduly inconvenienced, and that uses of the rights of way, including maintenance and upgrade of facilities, are undertaken in a manner which is in accordance with local requirements. Local cable franchising also ensures that our local community's specific needs are met and that local customers are protected.

Local franchises thus provide a means for local government to appropriately oversee the operations of cable service providers in the public interest, and to ensure compliance with applicable laws. There is no need to create a new Federal bureaucracy in Washington to handle matters of specifically local interest.

Finally, local franchises allow each community, including ours, to have a voice in how local cable systems will be implemented and what features (such as PEG access and institutional networks) will be available to meet local needs. These factors are equally present for new entrants as for existing users.

The Northern Dakota County Cable Communications Commission ("NDC4") therefore respectfully requests that the Commission do nothing to interfere with local government authority over franchising or to otherwise impair the operation of the local franchising process as set forth under existing Federal law with regard to either existing cable service providers or new entrants.

Respectfully submitted,

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("NDC4")

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